

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

SAO No.46 of 2012 (O&M)

Date of decision:10.12. 2015

Tej Kaur and others

-Appellants

Versus

Mohinder Kaur @ Guddi and others

Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Deepak Aggarwal, Advocate
for the appellants.

Mr. Sherry K. Singla, Advocate
for the respondents.

RAJ MOHAN SINGH, J. (ORAL)

[1]. Defendants have directed this present appeal against the judgment dated 30.04.2012 vide which the case has been remanded to the trial Court after allowing an application under Order 6 Rule 17 CPC filed by plaintiffs. The trial Court has been directed to decide the suit preferably within 6 months from the date of receipt of the record.

[2]. Plaintiffs filed suit for declaration to the effect that transfer deed dated 25.11.2008 executed by Tej Kaur in favour of his sons Modan Singh and Resham Singh in respect of 34 kanals, 3 marlas of land to be illegal, null and void.

[3]. Plaintiffs alleged that plaintiffs and defendants No.1 to 4 constituted a Joint Hindu Family. Tej Kaur-defendant No.1 is mother-in-law of plaintiff No.1 and grand-mother of plaintiffs No.2 to 4. Lakha Singh was son of defendant No.1. Defendants No.2 and 3 are real sons of defendant No.1 and brothers of deceased Lakha Singh. Will was executed by Jangir Singh in favour of his wife Tej Kaur and three sons Lakha Singh, Modan Singh and Resham Singh vide registered Will dated 16.04.1980. After registration of aforesaid Will, mutation was also sanctioned and Lakha Singh died thereafter. Mother of Lakha Singh i.e. defendant No.1 inherited 1/5th share of Lakha Singh thereafter she transferred entire share which received by way of Will dated 16.04.1980 in favour of his two sons namely Modan Singh and Resham Singh. Plaintiff being widow of Lakha Singh challenged the transfer deed dated 25.11.2008 executed by defendant No.1 in favour of defendants No.2 and 3 in respect of property which she received by means of aforesaid Will. Defendants contested the suit on number of grounds.

[4]. From the pleadings of the parties, following issues were framed by the trial Court:-

“1. Whether the transfer deed by defendant No.1 in favour of defendants No.2 and 3 regarding suit property is illegal, null and void and is liable to be set aside? OPP

2. Whether plaintiffs are entitled to the relief of declaration as prayed for? OPP

3. *Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for? OPP*
4. *Whether the plaintiffs have concealed the material facts from the Court? OPD*
5. *Whether suit of the plaintiffs is maintainable in the present form? OPP*
6. *Relief.”*

[5]. To prove their case, one of the plaintiff Mohinder Kaur herself appeared as PW 1 and got examined Gurjant Singh Nambardar as PW2. Thereafter plaintiffs failed to conclude their evidence and consequently evidence of the plaintiffs was closed by order of the Court on 25.02.2010. Defendants in their evidence got examined Modan Singh as DW 1, Gurtej Singh as DW2 besides examining scribe of the transfer deed namely B.R. Bansal as DW 3 and thereafter, closed the evidence.

[6]. Trial Court dismissed the suit vide judgment and decree dated 02.11.2010. Plaintiffs went in appeal before the lower Appellate Court. On coming to know the factum of recital of Will they sought amendment of the pleadings in terms of Order 6 Rule 17 CPC on the ground that in the Will itself Tej Kaur was conferred with only lifetime interest. Therefore, she was not competent to part with the property by way of transfer deed dated 25.11.2008. Since the plaintiffs were also entitled to property which was subject matter of Will in view of creation of only lifetime interest in favour of defendant No.1, therefore, the issue requires to be debated with reference to evidence on

record. The Lower Appellate Court allowed the application for amendment of the plaint and remanded the case back to the trial Court after setting aside the impugned judgment and decree.

[7]. Learned counsel for the appellants contends that since remand has been made after acceptance of application under Order 6 Rule 17 CPC, therefore, remand falls under the category of Order 41 Rule 23-A CPC and for that findings recorded under all the issues should have been set aside by the lower Appellate Court. The lower Appellate Court has partly accepted the appeal without setting aside the judgment and decree as a whole and therefore a report could have been asked for from the trial Court in terms of Order 41 Rule 25 CPC. Learned counsel for the appellants further contends that evidence of the plaintiffs was closed by order of the Court and such order was never assailed by the plaintiffs in any Forum nor the same has been assailed in the appeal filed before the lower Appellate Court. Remand would facilitate the plaintiffs to adduce evidence despite the fact that order closing the evidence of plaintiffs had attained finality and therefore, remand has been made in a routine which should not have been ordered in order to allow the plaintiffs to fill lacuna in his case. The lower Appellate Court on the basis of recital in the Will itself could have devised lawful criteria to decide the appeal on merits without remanding the case back to the trial Court.

[8]. On the other hand, learned counsel for the respondent states that transfer effected by defendant No.1 in respect of property devolved upon her by way of Will goes to the very root of the case inasmuch as that defendant No.1 was not the absolute owner of the property in terms of Section 14(1) and 14(2) of Hindu Succession Act 1956. Defendant No.1 was having a lifetime interest in the property. Since the transfer effected by defendant No.1 was without jurisdiction or any authority of law, therefore, transaction being void has to be appreciated with reference to framing of proper issues by the trial Court. In support of his contention learned counsel for the respondents relies upon “**Shivdev Kaur (D) by LRS and others Vs. R.S. Grewal. 2013 (4) SCC 636**” wherein the proposition in terms of Section 14(1) and 14(2) of Hindu Succession Act has been elaborately discussed and it has been held that the property acquired by Hindu female by way of Will or gift which was given to her only as a lifetime interest would remain the same even after commencement of Hindu Succession Act and therefore, Hindu female cannot acquire absolute title in respect of property so conferred upon her by way of Will or gift.

[9]. Having heard the controversy at some length, I am of the considered view that lower Appellate Court should have decided whether the case in hand falls under the category of Order 41 Rule 23, 23-A or 25 CPC. Lower Appellate Court was

also obligated to appreciate the entitlement of the parties viz-a-viz Section 14 (1) and 14(2) of Hindu Succession Act and only then grounds of expediency should have been recorded to the effect that whether the case in hand requires re-hearing before the trial Court or not? The lower Appellate Court has not commented upon the order closing evidence of the plaintiffs by order of the Court and there was no challenge made to that order by the plaintiffs in any Forum including the grounds of appeal filed before the lower Appellate Court.

[10]. Since the impugned judgment is silent about all these facts, therefore, it would be appropriate to remand this case back to the lower Appellate Court. Lower Appellate Court would be obligated to decide the controversy afresh after taking into consideration the legal position as well as necessity of remand, in case, it is found that issue involves herein requires any such process for taking evidence at the hands of trial Court or not. If the lower Appellate Court finds that case involves taking of evidence by the trial Court then the requirement of remand in terms of Order 41 Rule 23-A has to be complied. In case lower Appellate Court finds that a report from the trial Court would suffice to serve the purpose of taking evidence on the amendment application and in that eventuality the lower Appellate Court shall form an opinion whether provisions of Order 41 Rule 25 CPC are attracted or not. In any case, lower

Appellate Court would be obligated to decide the appeal afresh after taking into consideration all the aforesaid necessary observations.

[11]. With these observations, impugned judgment of Lower Appellate Court is set aside. Accordingly appeal is allowed.

[12]. Both the parties are directed to appear before the lower Appellate Court on 15.01.2016.

(RAJ MOHAN SINGH)
JUDGE

December 10, 2015

prince